IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 597

JAMES E. MILLS,
Defendant, Appellant,

vs.

STATE OF ALABAMA,
Plaintiff, Appellee

On Appeal from the Supreme Court of Alabama.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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INDEX

TABLE OF CASES CITED

STATUTES CITED

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STATEMENT

Appellant files this Brief in Opposition to the Motion to Dismiss or Affirm and in response to Appellee's misleading arguments on this appeal. Appellant's authorities amply support its position both on the jurisdictional issues and on the merits.

I. THE DECISION OF THE SUPREME COURT OF ALABAMA WAS FINAL

(Answering Appellant's Motion, Pages 2–4)

The decision of the Supreme Court of Alabama is final for the purposes of 28 U.S.C. §1257, since it held that §285 of Title 17 was constitutional and not violative of the First and Fourteenth Amendments; it further held that the editorial by the Appellant violates the Corrupt Practices Act. Appellant has already conceded in this Court (Jurisdictional Statement, p. 7) that he has no further defenses to raise below. This concession brings the case within the authority of *Pope v. Atlantic Coast Line R. Co.* 345 U.S. 379 (1953), and distinguishes it from the prior decision of this Court in *Polakow's Realty Experts v. Alabama*, 319 U.S. 750 (1943), and the other authorities cited on page 2 of Appellee's Motion to Dismiss or Affirm. The Appellant relies solely on the constitutional question as to the validity of §285 (Jurisdictional Statement, p. 4), and the Supreme Court of Alabama has ruled §285 constitutional (Jurisdictional Statement, Appendix A).

The authorities cited in the Jurisdictional Statement to sustain the jurisdiction of this Court make it clear that the prompt resolution of constitutional claims in criminal, as well as civil, litigation is desirable. As this Court stated only last term:

> "A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. See, e.g., *Smith v. California*, 361 U.S. 147. When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption

that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. See *Baggett v. Bullitt, supra*, at 379. For '(t)he threat of sanctions may deter ... almost as potently as the actual application of sanctions ...' *NAACP v. Button*, 371 U.S. 415, 433. Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression -- of transcendent value to all society, and not merely to those exercising their rights -- might be the loser." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965).

Delay in the adjudication of Appellant's constitutional rights must be considered an important factor in this case. The criminal complaint against Appellant was filed on November 13, 1962. Thus, it has taken approximately three years for this proceeding to reach only the threshold of this Court, in spite of the expediting provisions of the Alabama statutes for appeals directly to the Alabama Supreme Court from decisions in criminal cases holding the statute involved unconstitutional. (Title 15, §370, Code of Alabama 1940, Jurisdictional Statement, Appendix F.) If this Court declines to accept jurisdiction of this appeal for want of a final judgment, the case will be remanded to the trial court and thereafter will have to wend its way back up through the appellate procedure of Alabama, beginning with trial in the Jefferson County Criminal Court where, under the mandate of the Supreme Court of Alabama, the Appellant will be found guilty. Appeal to the Circuit Court will require bond to be made (§349, Title 13 (Appendix 1); second trial de novo (§363, Title 17 (Appendix 2); and appeal to the Alabama Court of Appeals, (§366, Title 15 (Appendix 3). A constitutional question being involved, it would be referred to the Supreme Court of Alabama (§87, Title 13 (Appendix 4). The

Supreme Court of Alabama will then pass upon the same constitutional question which it originally decided on the State's appeal. (Jurisdictional Statement, Appendix A). The only controverted issues in this case are Appellant's federal constitutional claims since all others have been resolved by the decision of the Supreme Court of Alabama or have been conceded by Appellant. Such a prolongation of a decision to vindicate Appellant's constitutional rights would be intolerable.

Appellee's contention that the decision is not final because "it may happen that, for some reason, the trial will never take place" (Motion to Dismiss, p. 2) lacks substance. The State insisted on trial and appealed from the ruling of the lower court which held §285, Title 17, to be unconstitutional (Jurisdictional Statement, Appendix E). The State of Alabama now seeks to challenge this appeal on the ground of lack of finality when, pursuant to the policy of the State favoring a prompt determination of constitutional issues in the State courts, the State took a direct appeal to the Supreme Court of Alabama (§370, Title 15 Jurisdictional Statement, Appendix F).

Although Appellee makes much of the purported distinction between civil and criminal cases (Motion to Dismiss, pp. 3–4), it offers no justification for such a distinction. 28 U.S.C. §1257 establishes none. If any is to be made, the requirements of finality should be less rigid in criminal prosecutions, with their "threat of sanctions", particularly in those cases involving constitutional issues where the interests of the public, as well as those of the individual litigant, are in question.

Historically, this Court has cited civil and criminal cases interchangeably on the issue of finality. See, e.g., *Brown v. South Carolina*, 298 U.S. 636 (1936) (Motion to Dismiss, p. 2), which arose on a motion to quash an indictment but relied for authority only on civil cases. Thus, insofar as the holding of the *Polakow* case may be thought to control the in-

stant appeal, it has since been modified by the more recent cases cited by Appellant (Jurisdictional Statement, p. 8), such as the *Pope* and *Richfield Oil* decisions. At any event, the *Polakow* case and its predecessors are distinguishable from the instant appeal because there was no waiver of other defenses based on non-constitutional questions.

The question of finality of a judgment of the New York Court of Appeals in a case which had not been tried on its merits was considered by Justice Goldberg in the case of *Rosenblatt v. American Cyanamid Company*, (July 13, 1965), 86 S. Ct. 1, in which he stated, on page 3:

> " * * I am satisfied, however, that under our decisions the judgment of the New York Court of Appeals from which this appeal is sought was a final one. There are two recent opinions of this Court which impel me to this conclusion, *Local No. 438 Construction and General Laborers' Union v. Curry*, 371 U.S. 542, 83 S. Ct. 531, 9 L.Ed.2d 514, and *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 83 S.Ct. 520, 9 L.Ed.2d 523. Here, as in *Curry*, there has been: (1) a final assertion of jurisdiction, with no further review of that issue possible in the state courts;[6] (2) a threat of serious erosion of national policy (here, the due process right against subjection to excessive state assertions of *in personam* jurisdiction); and (3) a state judgment on an issue anterior to and separable from the merits, and no enmeshed in the factual controversies of the case. Langdeau held final a preliminary determination of venue which would have led to a totally unnecessary trial, where the federal right asserted was precisely one not to stand trial at all in the state court where the com-

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"6. As in Curry, the jurisdictional issue here would merge with the merits, and hence would ultimately be reviewable in this Court after a trial was held. But Curry indicates this does not preclude finality."

plaint has been filed.[7] These cases rest upon the premise that a litigant should not be forced to take the risk of a default judgment in order to obtain the benefits which national policy – in *Curry*, federal pre-emption of unfair labor practice cases; in *Langdeau*, a special venue statute for national banks; here, if appellant is correct, due process – is designed to afford him. I therefore conclude that the judgment below is a final one."

The Appellee did not and could not dispute the fact that a state statute was "drawn in question" and sustained over constitutional objections. The opinion of the Supreme Court of Alabama was the final decree upon this issue. If this Court, for any reason, believes that an appeal is not the proper procedure, it is respectfully requested that the appeal by the Appellant be considered in the nature of a writ of certiorari. *Title 28, §1257(3); Rules of the Supreme Court, 19(1) (a).* See Also *J. Unger, Appellant, v. A. Sarafite*, 376 U.S. 575, 84 S.Ct. 841, in which the Court treated an appeal as a petition for certiorari, and stated:

" * * That remittitur speaks of rights asserted and passed upon under the Fourteenth Amendment and does not indicate that a state statute was "drawn in question" and sustained over constitutional objections. See *Mergenthaler Linotype Co. v. Davis*, 251 U.S. 256, 259, 40 S.Ct. 133, 134, 64 L.Ed. 255; *Charleston Federal Savings & Loan Assn. v. Alderson*, 324 U.S. 182, 185–186, 65 S.Ct. 624, 627, 89 L.Ed. 857. The appeal is accordingly dismissed. Treating the appeal as a petition for certiorari, certiorari is granted, 28 U.S.C. §2103, *Anonymous Nos.*

"7. Here, as in Langdeau, the preliminary decision might prove to be mooted by a decision in favor of appellant on the merits. But since the federal right is one not to stand trial, the possible outcome of a trial is, Langdeau indicated, irrelevant. See generally on Curry and Langdeau, Note, The Requirement of a Final Judgment or Decree for Supreme Court Review of State Courts, 73 Yale L.J. 515 (1964)."

6 *and* 7 *v. Baker*, 360 U.S. 287, 79 S.Ct. 1157, 3 L.Ed.2d 1234, limited, however, to the three constitutional issues which the amended remittitur states petitioner had argued and which, we assume, were the constitutional questions the New York Court of Appeals passed upon."

If this Court believes that the arguments as to finality raised by Appellee cast serious doubt on its jurisdiction, Appellant respectfully urges that he be permitted to argue the jurisdictional elements of his case in his brief on the merits pursuant to Rule 16(4) of this Court. See *Cramp v. Board of Public Instruction*, 366 U.S. 934 (jurisdiction postponed), 368 U.S. 278, 280–285 (1961). The issue is of substantial importance not only with respect to this appeal but to litigants generally.

II. THE QUESTIONS PRESENTED ON THIS APPEAL ARE SUBSTANTIAL

The argument of Appellant that the decision of the Supreme Court of Alabama was clearly correct and that no substantial federal question is presented demonstrates that on the contrary, the constitutional issues herein presented are of major importance to safeguarding freedom of expression.

A. THE DECISION OF THE SUPREME COURT OF ALABAMA IS MANIFESTLY ERRONEOUS

(Answering Motion to Dismiss, pages 4–9)

Appellee, in the second paragraph of its argument with respect to the merit of this appeal (Motion to Dismiss or Affirm, p. 4), openly concedes that Section 285 of the Ala-

bama Corrupt Practices Act (Jurisdictional Statement, Appendix C) "impairs only the right of free speech which includes the right to write and publish its views." This frank admission should be sufficient to invalidate the section in question. None of Appellee's arguments support the constitutionality of the statute. Appellee apparently relies upon the "police powers of the State" to override the constitutional guarantees of the First and Fourteenth Amendments, without regard to the application of the "clear and present danger" test.

The contention that the statute is justified because it "grew out of turbulent times" (Motion to Dismiss, p. 6) is not sufficient to save it. Thus, while at one time criminal libel statutes may have been warranted to prevent breach of the peace, such a contention cannot be sustained today. *Garrison v. Louisiana*, 379 U.S. 64, 69–70 (1964). What this Court said with respect to the Louisiana Criminal Libel Statute invalidated there applies equally to Section 285:

> "But Louisiana's rejection of the clear-and-present-danger standard as irrelevant to the application of its statute, 244 La., at 833, 154 So. 2d, at 416, coupled with the absence of any limitation in the statute itself to speech calculated to prevent breaches of the peace, leads us to conclude that the Louisiana statute is not this sort of narrowly drawn statute." 379 U.S. at 70.

It is clear that a statute which purported to prohibit public discussion of issues involved in pending litigation in the courts would be unconstitutional. Cf. *Bridges v. California*, 314 U.S. 252 (1941).

Granting that a state has the right to regulate elections by statutes narrowly drawn to safeguard the integrity of the voting process (Jurisdictional Statement, p. 10) is not an admission that the state can generally prohibit expressions

of opinion concerning election issues on election day. Restrictions which are properly defined may in some instances be appropriate, but vague and indefinite restrictions which would create a complete black-out of all news and editorial comment on election day are clearly violative of the First and Fourteenth Amendments.

The argument of Appellee that tricksters may spread falsehoods upon candidates and issues with no chance for reply (Motion to Dismiss, p. 8) is meretricious. In every election, someone will always have the last word. If a statute prohibited discussion of election issues within the last two weeks prior to the election, the person who expressed his views on the 15th day would have the final say. Further, last minute actions by public officials or candidates may require last minute comments. Thus, in the instant case, Mayor Hanes, who was the subject of the editorial here involved, had taken certain actions immediately prior to election day which Appellant regarded as reprehensible. The editorial promptly ensued. If the statute now before the Court should be sustained, the result would be that the actions of public officials or candidates for public office would be immune from criticism at the most vital time.

B. SECTION 285 IS VAGUE AND INDEFINITE
(Answering Motion to Dismiss, pages 9–10)

Nor does Appellee's argument concerning the supposed clarity of Section 285 have force. It is evident that Appellee itself has little or no notion of its broad scope. Appellant contends that the statute should be construed to exclude all media of public and private information on election day in general as well as newspapers in particular. The Supreme Court of Alabama gave the statute the broadest possible interpretation. It did not make any effort to delineate what kinds of expression, either by media of public information or

by private persons, are covered or left free by the prohibitions of the statute. (See Jurisdictional Statement, Appendix A, at page 23.) No one in the State of Alabama can determine with assurance what type of statement on election day with respect to public affairs falls within or without the prohibitions of the statute as presently construed by the Supreme Court of that state.

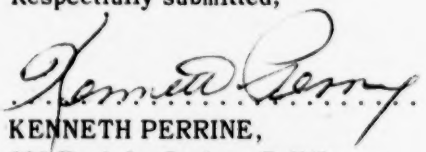
The Appellee would weigh the value to the public of a vacuum in which the electorate is to cast its vote against the complete curtailment of the rights guaranteed by the First and Fourteenth Amendments. The cases cited in support of its position only emphasize its weakness (Motion to Dismiss, pp. 5–6). The cases cited all involve the activities of the Communist Party and were based upon extensive findings by Congress or the trial court concerning that organization. See *Dennis v. United States*, 341 U.S. 494–498, 71 S.Ct. 857; *American Communications Association v. Douds*, 339 U.S. 382, 388–389; *Communist Party of the United States v. Subversive Activities Control Board*, 367, U.S. 1, 5–8. The Appellee completely ignores the clear and present danger test which was clearly enunciated in the case of *Schenck v. United States*, 249 U.S. 47, 39 S.Ct. 247.

Nowhere has a court decision been found which has held constitutional the drastic restrictions set forth in Section 285. In the case of *State ex rel La Follete v. Kohler*, 228 N.W. 895, the issue of the corrupt practices act was limited to the constitutionality of a ceiling of $4,000 on disbursements permitted a candidate and those acting on his behalf in a primary election. That case has no bearing upon freedom of expression. The quotation cited on page 8 of the Motion to Dismiss, *Alabama State Federation of Labor v. McAdory*, 67 S.Ct. 1384, is not a quotation from the Supreme Court decision, but the expression of the Supreme Court of Alabama, 246 Ala. 1, 18 So. 2d 810, 815.

CONCLUSION

This Court has jurisdiction on this appeal. The decision of the Supreme Court of Alabama holding Section 285 of the Alabama Corrupt Practices Act constitutional as applied to Appellant is final and erroneous. The questions presented are of substantial public importance and the people are entitled to know if their freedom of speech and assembly are to be curtailed under a vague and undeterminable statute. It is respectfully submitted that Appellee's Motion to Dismiss or Affirm should be denied and that probable jurisdiction of this appeal should be noted.

Respectfully submitted,



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PROOF OF SERVICE

I, Kenneth Perrine, attorney for James E. Mills, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of November, 1965, I served copies of the foregoing Appellant's Brief in Opposition to Motion to Dismiss or Affirm, upon the State of Alabama, by serving a copy of the same on Earl C. Morgan, Solicitor of the Tenth Judicial Circuit of Alabama, Jefferson County Courthouse, Birmingham, Alabama, attorney for the State of Alabama, and upon the Hon. Richmond Flowers, Attorney General of the State of Alabama, Montgomery, Alabama, by mailing a copy in a duly addressed envelope, first class, postage prepaid, to said parties.

Kenneth Perrine

APPENDIX 1

Title 13, §349, Code of Alabama, 1940:

"§349. APPEAL TO CIRCUIT COURT; APPEAL Bond. In all cases of conviction in the county court, the defendant shall have the right of appeal to the circuit court of the county, and on entering into bond, with sufficient surety, to appear at the session of the court to which the appeal is taken, and from session to session until discharged; the bond to be in such penalty as the judge of the county court may prescribe, and to be approved by him. If the defendant does not make the bond required, he shall remain in custody."

APPENDIX 2

Title 15, §363, Code of Alabama, 1940:

"§363. TRIAL OF APPEAL DE NOVO; STATEMENT OF CAUSE OF COMPLAINT. The trial in the circuit court shall be de novo, and without any indictment or presentment by the grand jury; but the solicitor shall make a brief statement of the cause of complaint signed by him, which may be in the following form:

The State of Alabama (In the Circuit Court . . . . . 19..

County)On appeal from the county court.

The State of Alabama, by its solicitor, complain of C.D. that, within twelve months before the commencement of this prosecution, he did (here describe the offense as in cases of indictment.)

G. H., solicitor. "

APPENDIX 3

Title 15, §366, Code of Alabama, 1940:

"§366. APPEALS TO THE COURT OF APPEALS. Wherever jurisdiction is now or may hereafter be conferred on the court of appeals, a review or revision may be had in and by the court of appeals, in the same manner, by the same mode and means as is provided for appeal, review or revision in or by the supreme court; and wherever the appeal or revision is taken or attempted to be taken to the supreme court, when it should have been taken to the court of appeals, the supreme court may ex mero motu or upon motion have the case, record, and proceedings transferred to the court of appeals for decision and disposition by the court of appeals; and if the appeal or review is taken or attempted to be taken to the court of appeals when it should have been taken to the supreme court, the court of appeals may ex mero or on motion transfer the case, record and proceedings to the supreme court for disposition by the supreme court. If, however, there should be a conflict or difference of opinion between the two courts, as to which has jurisdiction of the appeal or proceedings to review, the decision of the supreme court shall control."

APPENDIX 4

Title 13, §87, Code of Alabama, 1940:

"§87. QUESTIONS OF CONSTITUTIONALITY REFERRED TO SUPREME COURT. If the validity of a statute of this state or of the United States is involved said court of appeals shall so certify and thereupon the transcript and all papers in said cause, with such certificate shall be transmitted to the supreme court and all proceedings conducted thereafter as if said cause had been appealed originally to said supreme court."